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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6042

RONALD DALE WARDIUS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A. The facts of the instant case raise no issues requiring decision by this Court, since petitioner by his willful tactics at time of trial gave the trial court no opportunity to take appropriate corrective action with respect to any alleged constitutional irregularities in ORS 135.875	4
B. ORS 135.875 is constitutional insofar as it has been applied in this case	7
C. In requiring petitioner to give notice of alibi as a condition precedent to giving testimony in his own behalf, ORS 135.875 does not deny petitioner either his right to testify in his own defense or his right to remain silent	8
D. The sanction of the exclusion of testimony of both petitioner and his witness is constitutional	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:	Page
Brady v. Maryland, 373 US 83 (1964)	10
Brown v. Mississippi, 297 US 278	7
California v. Byers, 402 US 424 (1971)	11
California v. Green, 399 US 149 (1970)	10
Commonwealth v. Vecchiolli, 208 Pa Super 483, 224 A2d 96 (1966)	12
Gilbert v. California, 388 US 263 (1967)	11
Henry v. Mississippi, 379 US 443 (1965)	6, 11
Holt v. United States, 218 US 245 (1910)	11
Illinois v. Allen, 397 US 337 (1970)	10
Mayberry v. Pennsylvania, 400 US 455 (1971)	10
Moore v. Illinois, — US —, 40 USL Week 5071 (June 29, 1972)	11
Rideau v. Louisiana, 373 US 723	7
Rider v. Crouse, 357 F2d 317 (10th Cir 1966)	12
Schmerber v. California, 384 US 757 (1966)	11
Shipman v. Gladden, 253 Or 191, 453 P2d 921 (1969)	6
State v. Angeleri, 51 NJ 382, 241 A2d 3 (1968)	12
State v. Blake, — Or App —, 490 P2d 1026 (1971)	5, 6, 8
State v. Cunningham, 89 Ohio L Abs 206, 185 NE2d 327 (Ct App 1961)	12
State v. Rider, 194 Kan 398, 399 P2d 564 (1965)	13
State v. Schleigh, 210 Or 155, 310 P2d 341 (1957)	10

TABLE OF AUTHORITIES—Continued

	Page
State ex rel. Sikora v. Dist. Ct., 154 Mont 241, 462 P2d 897 (1969)	12, 13
State ex rel. Simos v. Burke, 41 Wis2d 129, 163 NW2d 177 (1968)	9
State v. Zusman, 1 Or App 268, 460 P2d 872 (1969)	5
Williams v. Florida, 399 US 28 (1970)	*passim*
United States v. Augenblick, 393 US 348 (1969)	7
United States v. Wade, 388 US 218 (1967)	11
Younger v. Harris, 401 US 37 (1971)	8
Constitutional Provisions:	
Constitution of the United States	
Fifth Amendment	8, 11, 12
Fourteenth Amendment	8, 11
Statutes:	
Florida Rules of Criminal Procedure	
Section 1.200	7
Oregon Revised Statutes:	
Section 135.875	*passim*
Section 138.510	6
Section 138.530	6
United States Code:	
Title 28, section 3500	7

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BRIEF FOR RESPONDENT

THE QUESTIONS PRESENTED

Respondent would supplement petitioner's statement of questions presented by adding the following threshold question:

4. On the basis of this record, has petitioner raised any substantial constitutional issue requiring review by this court?

STATEMENT OF THE CASE

Respondent excepts to that portion of petitioner's statement of the case which states, "Defense counsel objected to the court's rulings to exclude the testimony

of Miss McFadden and petitioner from the consideration of the court." Although respondent recognizes that a discussion was held at trial concerning the invocation of Oregon's alibi statute on the basis of *Williams v. Florida*, no objection to the imposition of the sanction appears on the record.

Respondent would supplement petitioner's statement of the case as follows:

Counsel for petitioner acknowledged he had not complied with the requirement of ORS 135.875 (A. 6). Pursuant to the statute, the court offered counsel an opportunity to explain his omission. Initially, counsel gave two related reasons: He viewed the statute as being unconstitutional by virtue of this Court's decision in *Williams v. Florida*, 399 US 28 (1970), and he had prevailed upon another circuit court judge to accept his view (A. 7).

The court asked if the omission of the notice was prompted by ignorance of the facts in the case (A. 8). Counsel for petitioner advised the court that on August 4, 1970, there was a hearing on a motion to suppress in a companion case at which petitioner and his trial counsel were present. During cross-examination of the state's key witness, the defense obtained the mistaken impression that the witness would testify that the sale of narcotics in the instant case occurred on May 22—the date the indictment was handed down—instead of May 21, as alleged in the indictment. Trial counsel claimed he built his plans for defense of the case around this variance in dates (A. 8-11). His plans included the calling

of alibi witnesses for May 22, although he gave no notice concerning these latter witnesses either (A. 5-10). Trial was held September 16, 1970—43 days after the hearing on the motion to suppress. Yet trial counsel failed to obtain a transcript, or to check with the court reporter to confirm that the crucial discrepancy in dates actually existed, until two days prior to trial (A. 8-9). Discovering that the testimony had referred to the 21st and not the 22nd, petitioner then allegedly first disclosed that he had been at a drive-in movie with a girl on the evening of the 21st. Trial counsel still filed no notice, this time because he did not know the girl's name (A. 8). Petitioner had known the girl for four years (A. 4). Trial counsel made no request for delay in order to comply with the alibi statute. He did not suggest or request any less serious sanction than striking the proffered testimony (A. 10-11). Neither did he make any request for expanded or reciprocal discovery rights in connection with the alibi statute, although he was aware of this Court's decision in *Williams v. Florida, supra.* Instead, he took the broad position that the statute was simply not enforceable after *Williams* (A. 7).

SUMMARY OF ARGUMENT

The facts of this case do not raise the issues pressed by petitioner, except for the abstract question of the constitutionality on its face of ORS 135.875, since petitioner, by his tactics at trial, made no effort to obtain reciprocal discovery, made no specific objection to the sanction of testimonial exclusion which the court im-

posed, and offered or requested no alternative to such sanction.

ORS 135.875 is not unconstitutional on its face by virtue of its lack of specific language offering petitioner reciprocal discovery rights against the state, even assuming the availability of such rights is constitutionally necessary, and petitioner has not been denied due process of law, absent a showing the statute has been construed to exclude such right and/or petitioner has been otherwise specifically denied such right.

ORS 135.875, in requiring petitioner to give notice of alibi as a condition precedent to giving testimony in his own behalf, does not deny petitioner either his right to testify in his own defense or his right to remain silent.

The sanction of exclusion of the testimony of petitioner and his witness under ORS 135.875 is constitutional.

ARGUMENT

A.

THE FACTS OF THE INSTANT CASE RAISE NO ISSUES REQUIRING DECISION BY THIS COURT, SINCE PETITIONER BY HIS WILLFUL TACTICS AT TIME OF TRIAL GAVE THE TRIAL COURT NO OPPORTUNITY TO TAKE APPROPRIATE CORRECTIVE ACTION WITH RESPECT TO ANY ALLEGED CONSTITUTIONAL IRREGULARITIES IN ORS 135.875.

At the time of trial, petitioner attempted to introduce

alibi evidence, both through the testimony of witness Colleen McFadden and that of petitioner himself (A. 4-11). The district attorney objected, and was sustained, on the basis of respondent's failure to comply with Oregon's notice of alibi statute, ORS 135.875 (A. 10, 11).[1]

A full inquiry into counsel's reasons for failing to supply the required notice showed that counsel was fully aware of the notice requirement, but considered the statute to be unconstitutional and unenforceable (A. 5-10). Petitioner's dilemma is thus one of his own (or at least his trial counsel's) making: By adopting the position that the Oregon alibi statute was entirely unenforceable, petitioner effectively took from the trial court any chance to modify its impact upon petitioner. By timely motion, petitioner might have raised the issues he felt were presented by the statute, including requests for reciprocal discovery rights with respect to alibi witnesses, and modification of its testimonial exclusion. He did not.[2] Failure to do so, coupled with trial counsel's failure to confirm crucial evidence prior to trial, may raise questions as to the adequacy of petitioner's representation at trial. However, the forum for the examination of such questions is not here, but in Oregon courts

[1] For the full text of ORS 135.875, see Brief for Petitioner 3-4.

[2] Both by his brief and by his petition for certiorari, petitioner asserts, "Defense counsel objected to the court's rulings to exclude the testimony of Miss McFadden and petitioner from the consideration of the court." Brief for Petitioner 5; Petition for Writ of Certiorari 5. Petitioner is mistaken; no such objection was made (A. 10-11). Neither was there any request for an alternate sanction. Under these circumstances, it is doubtful that petitioner's record should permit review of alleged constitutional imperfections. *State v. Blake*, — Or App —, 490 P2d 1026 (1971). And see *State v. Zusman*, 1 Or App 268, 460 P2d 872 (1969) Supreme Court *review denied* (1970), *cert. denied* 398 US 65 (1970).

pursuant to Oregon's Post-Conviction Relief Statutes, ORS 138.510 *et seq.*, especially ORS 138.530. See *Shipman v. Gladden,* 253 Or 191, 453 P2d 921 (1969).

The concept of fairness runs not just to criminal defendants, but to trial courts as well. It is axiomatic that a trial court should be afforded an opportunity to take "appropriate corrective action" where the possibility of error exists. See *Henry v. Mississippi,* 379 US 443, 448 (1965); *State v. Blake, supra.* Counsel did not afford the trial court such an opportunity:

1. Petitioner has made no showing that he would have been in any way prejudiced by complying with the statute.

2. Petitioner did not, either prior to or at the outset of trial, by motion or otherwise, request reciprocal discovery rights.

3. Petitioner did not, at any time, question the applicability of the statute's exclusionary rule to petitioner or to petitioner's witness, either by a motion for a continuance or through a request for, or suggestion of, any other sanction.[5]

Under these facts, it is respectfully urged that this case presents no issue not already decided in *Williams, supra.*[6] See *Henry v. Mississippi, supra,* 379 US at 448-449, 450, 451.

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[5] Neither was this issue, now treated as paramount by petitioner and *Amicus*—see argument D., *infra*—raised in a factual context which should have permitted the Oregon Court of Appeals to identify and understand it. See Brief for Appellant in court below at 20-27.

[6] See also Argument B, pp. 7-8, *infra.*

B.

ORS 135.875 IS CONSTITUTIONAL INSOFAR AS IT HAS BEEN APPLIED IN THIS CASE.

By his brief, petitioner asserts that ORS 135.875 denies petitioner due process of law if the statute does not grant him reciprocal discovery rights against the state.

Indeed, reciprocal discovery appears to be a principal concern of petitioner. However, general application of the Jencks Act, 18 USC § 3500, to state criminal prosecution is not required by the United States Constitution. See *United States v. Augenblick*, 393 US 348 (1969), where it is stated:

> "* * * But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, * * *, that the proceeding is more a spectacle (Rideau v. Louisiana, 373 US 723, 726 * * *) or trial by ordeal (Brown v. Mississippi, 297 US 278, 285 * * *) than a disciplined contest." *United States v. Augenblick, supra*, at 356.

Petitioner places heavy reliance upon a footnote in *Williams v. Florida, supra*. In *Williams*, this court upheld the constitutionality of Florida's notice of alibi rule, Florida Rules of Crim. Pro. § 1.200 (A. 16-17).[9] In so ruling, however, this court noted at 399 US 82, footnote 11:

> "We do not, of course, decide that each of these alibi notice provisions is necessarily valid in all respects; that conclusion must await a specific con-

[9] See Appendix to Opinion of the Court, 399 US at 104.

text and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State."

As noted in Argument A, *supra*, due to the trial tactics of petitioner, the extent to which an Oregon defendant may enjoy reciprocal discovery under ORS 135.875 remains unknown. See *State v. Blake, supra*. Assuming, *arguendo*, that reciprocal discovery is necessary to enable any such alibi statute to pass constitutional muster, there is no reason to assume that an Oregon court which is asked to provide for such discovery will ignore the language contained in the *Williams* footnote. Certainly, Oregon courts should at least be given an initial opportunity to construe ORS 135.875. *Cf. Younger v. Harris*, 401 US 37 (1971).

C.

IN REQUIRING PETITIONER TO GIVE NOTICE OF ALIBI AS A CONDITION PRECEDENT TO GIVING TESTIMONY IN HIS OWN BEHALF, ORS 135.875 DOES NOT DENY PETITIONER EITHER HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE OR HIS RIGHT TO REMAIN SILENT.

Petitioner next claims that ORS 135.875 compels defendant to be a witness against himself in violation of the Fifth and Fourteenth Amendments to the United States Constitution. However, this Court ruled to the contrary in *Williams v. Florida, supra*, stating:

> "We conclude, however, as has apparently every other court that has considered the issue, that the privilege against self-incrimination is not violated by

> a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." *Ibid.*, at 83.

Petitioner attempts to distinguish *Williams* on the theory that Florida's rule exempts the defendant from giving notice because the defendant may testify regardless of whether or not he complies with the rule, whereas Oregon's statute does not (A. 17). This ignores the rationale of *William's* approval of alibi statutes as safeguarding a legitimate public interest. As this Court there noted,

> "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." 399 US at 81.

An eleventh-hour alibi defense is no less vexatious because the defendant plans to testify to it all by himself. See *State ex rel. Simos v. Burke*, 41 Wis2d 129, 163 NW2d 177 (1968). The state's interest in an opportunity to find witnesses to show defendant was not where he claims to have been remains. Petitioner's claimed distinction fails.

D.

THE SANCTION OF THE EXCLUSION OF TESTIMONY OF BOTH PETITIONER AND HIS WITNESS IS CONSTITUTIONAL.

The principal attack mounted by petitioner and the *Amicus* is on imposition of the exclusionary sanction. It is urged that the sanction denies petitioner his constitutional right to testify and to call witnesses. In fact, it

does neither. Instead, it enforces an entirely reasonable and appropriate procedural rule relating to the legitimate state interest alluded to by this Court in *Williams*, *i.e.*, that of safeguarding the search for truth from fabricated eleventh-hour surprise alibis.

The right to testify, and to offer witnesses, is not absolute.[6] Evidence has always been limited in admissibility. However crucial to his case it may be, a defendant may not offer hearsay testimony. The rules relating to foundation still exist: even the most crucial expert witness may not offer opinion evidence until he has been qualified as an expert.

It is in just such a posture that the alibi exclusion should be viewed: a part of the necessary foundation for such testimony is *adequate notice*. Until such notice is provided, the testimony is inadmissible.[7]

The requirement that a defendant take certain reasonable procedural steps in order to avail himself of a constitutional right is not novel. See, *e.g.*, *Brady v. Maryland*, 373 US 83, 87 (1964). (Requirement of a request as condition precedent to successful invocation

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[6] In fact, not even the right to be present at trial is absolute. See *Illinois v. Allen*, 397 US 337 (1970); *Mayberry v. Pennsylvania*, 400 US 455 (1971). So it is with respect to cross-examination. See *California v. Green*, 399 US 149 (1970).

[7] *Cf. State v. Schleigh*, 210 Or 155, 310 P2d 341 (1957), where a defendant was denied the right to put on evidence relating to mental defect where he had failed to file the prior notice required by ORS 135.870, whose exclusion provision is essentially the same as that of 135.875. The problems of notice of alibi and notice of insanity defense are, of course, closely analogous. In the cases of insanity and alibi, requiring prior notice encourages a full and fair trial. Exclusion of evidence is the practical way of effectuating the statutory purpose, absent good cause for failure to file the notice.

of a claim of improperly suppressed evidence). *Accord, Moore v. Illinois*, — US —, 40 USL Week 5071, 5073 (June 29, 1972).[9]

Petitioner and *Amicus* urge that other, less restrictive measures should be used. However, none of their proposed alternatives is satisfactory.

1. Use of contempt to punish a defendant, his counsel, or both, for willful violation of a notice requirement. This appears to presume the alibi evidence will be admitted, thereby placing the court in the position of punishing an act it intends to permit. Lost is the whole point of the notice as a device for improving the trial as a search for truth, the rationale of *Williams v. Florida, supra*, 399 US at 82.

2. Granting a continuance to give the state time to meet the alibi defense. The state has a legitimate interest in concluding cases with dispatch. *Cf. Henry v. Mississippi, supra*, 379 US at 449. Moreover, as this Court has noted,

> "[I]f so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, then surely

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[9] Indeed, the notice requirement of ORS 135.875 exerts less serious pressures on a defendant than some pressures previously sanctioned by this Court. See *e.g., California v. Byers*, 402 US 424 (1971) (statutory requirement to stop at scene of automobile accident and divulge name and address held valid); *United States v. Wade*, 388 US 218, 221-223 (1967) (defendant required to exhibit his person for observation in line-up); *Gilbert v. California*, 388 US 263 (1967) (handwriting exemplar); *Schmerber v. California*, 384 US 757 (1966) (defendant gave blood test without consent—results admissible). *Cf. Holt v. United States*, 218 US 245 (1910) (defendant required to wear a blue blouse at trial). Here, while requiring the notice, the statute neither requires that the evidence be offered not authorizes the state to anticipate—either by comment or evidence—such proof of alibi during its case in chief.

> the same result may be accomplished through pre-trial discovery, as it was here, *avoiding the necessity of a disrupted trial.*" (emphasis supplied) *Williams v. Florida, supra,* 399 US at 86.

A continuance presumes the continuing availability of the trial judge (who will have other cases to try), the prosecutor (who will have other cases to try), the jurors (extending trial increases the possibility one or more will become ill, and effectively removes all jurors from the panel of veniremen since they could not serve on any other case which may become lengthy), and witnesses (some of whom may be from out of town or out of state, and all of whom have their availability strained as the case becomes more protracted). This method would, in many cases, encourage a defendant facing a trial with serious consequences to withhold his notice until the last possible moment, thereby creating maximum confusion and a danger of a mistrial.

> "* * * Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." *Williams v. Florida, supra,* 399 US at 85.

Accord, Commonwealth v. Vecchiolli, 208 Pa Super 483, 224 A2d 96 (1966); *State v. Cunningham,* 89 Ohio L Abs 206, 185 NE2d 327 (Ct App 1961); *Rider v. Crouse,* 357 F2d 317 (10th Cir 1966); *State v. Angeleri,* 51 NJ 382, 241 A2d 3 (1968), *cert den* 383 US 951 (1968); *State ex rel. Sikora v. Dist. Ct.,* 154 Mont 241, 462 P2d

897 (1969); *State v. Rider*, 194 Kan 398, 399 P2d 564 (1965).

3. Mistrial. This approach would constitute a "free way out" for a defendant whose very serious case was going badly: suddenly announce alibi and start over.

4. Arguing surprise to the jury. This approach would permit prosecuting counsel to testify to the jury concerning facts not in evidence, raising a whole new set of issues both with respect to the permissible scope of such comments, and the kind and scope of jury instructions required to clarify the issue.

The exclusionary sanction is both simple and fair, provided it is exacted only where a defendant had prior notice of it. Petitioner here had such notice.

CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the court below should be affirmed.

Respectfully submitted,

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